Supreme Court, U.S.
FILED

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No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1997

SRS TECHNOLOGIES, INC.

Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTION PRESENTED FOR REVIEW

1. Under the "Section 8(a)" Program, the U.S. Government awards federal contracts to minority-owned contractors without competition. There is a conflict among the Circuit Courts over the question of what is required to challenge the constitutionality of this Program. In order to establish such standing, is it enough that the Plaintiff's work has been displaced by a sole-source award under the Program, or (as the court below held) does the Plaintiff have standing only if it shows that it qualifies for participation in the Program on all grounds other than minority ownership?

PARTIES TO THE PROCEEDING

Petitioner SRS Technologies, Inc. ("SRS")[1] brought this action in the United States District Court for the Eastern District of Virginia to enjoin the performance of U. S. Government Contract No. SEA993-96-C-002 an award to a minority contractor without competition that displaced work being performed by SRS. Petitioner SRS was the only Plaintiff in the district court proceedings, was the only Appellant before the United States Court of Appeals for the Fourth Circuit, and is the only Petitioner in the present action.

Respondents are the United States Department of Defense, the United States Small Business Administration, the Defense Evaluation Support Agency, and intervenor High Technologies Solutions, Inc. ("HTS"), the minority contractor. Respondents were Defendants in the district court proceedings and Appellees before the United States Court of Appeals for the Fourth Circuit. The Minority Business Summit Volunteer Committee intervened as a Defendant in the district court proceedings, but withdrew as a party to the appeal before the Fourth Circuit.

There are no other parties to this action.

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[1] In accordance with S. Ct. R. 32(6), SRS states that it has no parent or subsidiary companies.

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No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1997

SRS TECHNOLOGIES, INC,

Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE, *et al.*,

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On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On May 6, 1997, the United States Court of Appeals for the Fourth Circuit issued its opinion in SRS Technologies, Inc. v. U.S. Dep't of Defense, No. 96-1484, slip op. (4th. Cir. May 6, 1997), affirming the decision of the United States District Court for the Eastern District of Virginia in SRS Technologies, Inc. v. U.S. Dep't of Defense, No. C/A 95-1792-A, slip op. (E.D. Va. Feb. 20, 1996). On July 1, 1997, the United States Court of Appeals for the Fourth Circuit issued its Order in the same case denying the Appellant's Petition for Rehearing. On July 9, 1997, the United States Court of Appeals for the Fourth Circuit issued its Mandate stating the judgment of the court dated May 6, 1997 would take effect on that day.

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment of the United States Court of Appeals for the Fourth Circuit, decided on May 6, 1997. That judgment affirmed the lower court's grant of dismissal for lack of standing. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1) (1994).

A petition for writ of certiorari intended to bring any judgment in a civil action, suit or proceeding before the Court for review shall be taken within ninety days after the entry of such judgment. 28 U.S.C. § 2101(c) (1994). Rule 13 of the U.S. Supreme Court Rules states that the time to file a petition for writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed. Rule 13 of the U.S. Supreme Court Rules states that the time to file a petition for a writ of certiorari runs from the date of the denial of the petition for rehearing, which in the present case was July 1, 1997. An Order denying Appellant's Petition for Rehearing. This Petition for Writ of Certiorari is filed on time.

STATEMENT OF THE CASE

This case concerns the Government's displacement of an incumbent subcontractor by means of an illegal and improper sole-source award of a Government contract, which was in violation of the U.S. Constitution and other applicable laws. The award was made under a federal program that impermissibly discriminates on the basis of race, and precludes Petitioner SRS and other contractors who are not members of the program the opportunity to compete for the work. The particular procurement at issue is the support services contract for the Pacific Missile Range Facility ("PMRF"), a military facility in Kauai, Hawaii. The court below held that SRS has no standing to challenge the constitutionality of the program under which it was displaced, and under which it was excluded from competition.

Several years ago, the Defense Evaluation Support Activity ("DESA"), a U.S. Department of Defense ("DoD") activity, awarded Contract No. MDA970-89-C-0019 (the "Prime Contract") to TRW,

Inc. ("TRW"). For over ten years, SRS, a small business concern, provided engineering services for the Prime Contract to the U.S. Navy at PMRF, under Subcontract No. EY9655AW9S with TRW. These services included technical and analytical support to PMRF.

In July 1995, SRS discovered that DoD, through its operating agency DESA, and the U.S. Small Business Administration ("SBA") had designated High Technology Solutions, Inc. ("HTS") as an eligible minority-owned contractor under the Minority Small Business and Capital Ownership Development Program (the "8(a) Program"), 15 U.S.C. § 637(a) (1994). SRS also discovered that DoD and the SBA had decided to replace SRS's subcontract with a prime contract awarded to HTS, under Contract No. SEA993-96-C-002 (the "HTS contract"). The contract was awarded pursuant to the SBA's race-based Section 8(a) Program, discussed in detail, infra.

HTS proposed to hire away SRS's employees, as a group, to perform the HTS contract requirements, and add one HTS employee. This requirement was never offered for competitive procurement, so SRS was afforded no opportunity to compete for the HTS contract. In fact, SRS learned of the award of the HTS contract only when it had become a virtual fait accompli.

Subsequently, SRS brought this action in the United States District Court for the Eastern District of Virginia (the "district court") to enjoin DoD and DESA from permitting performance of the HTS contract.[2] The district court had jurisdiction over SRS's complaint pursuant to 28 U.S.C. § 1331 (1994), because the action arose under the United States Constitution and laws of the United States, including but not limited to the Fifth and Fourteenth Amendments to the U.S. Constitution.

SRS alleged that the award of the contract had been based on racial "disadvantage" of HTS's owner, in violation of the Fifth Amendment to the U.S. Constitution. SRS also sought a declaration that the actions

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[2] At the time of filing this action in the district court, SRS had exhausted its administrative remedies, and the start of performance of the HTS contract was imminent.

of DoD and the SBA violated the Fifth Amendment, the Fourteenth Amendment, and the Administrative Procedures Act ("APA"). In addition, SRS alleged that the award was invalid because HTS did not meet the Section 8(a) Program's two-year experience requirement, and because the SBA failed to conduct the adverse impact analysis required by 13 C.F.R. § 124.309 (1995). These last two, nonconstitutional arguments are not at issue in this petition.

SRS moved for summary judgment in the district court. The intervenor HTS, joined by Defendants, moved for dismissal on the grounds that SRS lacked standing to bring this action since SRS was not denied the contract because of its owner's race.[3] On February 20, 1996, the District Court denied SRS's motion, granted Defendant's motion to dismiss, and dismissed the action.[4] SRS appealed to the U.S. Court of Appeals for the Fourth Circuit on April 19, 1996. The appeal was filed on time under 28 U.S.C. § 2107 (1994) and Fed. R. App. P. 4(a) (1). SRS maintains that it has standing by virtue of losing millions of dollars in revenue to a sole-source contract awarded on the basis of race, and whether SRS would qualify for the sole-source program itself is entirely irrelevant. The Fourth Circuit had jurisdiction under 28 U.S.C. § 1291 (1994), since the district court's judgment was final and dismissed all of SRS's claims with prejudice. The Fourth Circuit, in an

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[3] The Defendants relied on Dynalantic Corp. v. U.S. Dep't of Defense, 937 F. Supp. 1 (D.D.C. 1996) in support of their argument that contractors have no standing to raise an equal protection challenge to the Section 8(a) Program if they are ineligible for the program for any reason other than the Government's alleged use of race-based criteria. In fact, the Defendants attached a copy of that opinion to their brief in the Fourth Circuit. This decision, however, was reversed by Dynalantic Corp. v. U.S. Dep't of Defense, 115 F.3d 1012 (D.C. Cir. 1997) which is the principal case addressed in this petition, infra.

[4] Incredibly, the district court ruled that SRS had no standing because its owner "is a native of India," and therefore "Plaintiff is an intended beneficiary, not a victim, of the racial classification it challenges." App. at 9a. In other words, the court ruled that a company may challenge injury to it for the benefit of minorities only if it is owned by white people, and the courthouse doors are closed to all others.

unpublished decision issued on May 6, 1997, affirmed the district court's judgment.

The Fourth Circuit held, inter alia, that SRS lacked standing to raise its constitutional claims because it failed to show an injury in fact and a causal connection between the injury and the conduct of which it complained. In Section II of the Fourth Circuit's opinion, the relevant section, the court held that SRS lacked standing because it "was not prohibited from participating in the 8(a) Program for race-based reasons. Rather, SRS was ineligible to participate in the 8(a) Program because its owner is a multi-millionaire whose net worth exceeded SBA's guidelines for economic disadvantage by several orders of magnitude." App. at 4a.[5] Petitioner now seeks the review of this Court.

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[5] The Fourth Circuit did not rule against SRS's standing on the constitutional issues because SRS was a subcontractor, it had a task order contract, it had not submitted an actual written proposal to continue its work, it needed TRW's cooperation to submit such a proposal, or any of the other reasons argued by the Defendants.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING WHETHER A COMPANY WHICH IS NOT IN THE SECTION 8(a) PROGRAM (FOR WHATEVER REASONS) HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF A GOVERNMENT DECISION TO AWARD A FEDERAL CONTRACT DISPLACING IT TO A CONTRACTOR IN THE SECTION 8(A) PROGRAM.

The Small Business Act, 15 U.S.C. § 631 et seq. (1994 & Supp. 1996) (the "Act"), declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." Id. § 637(d)(1) (1994 & Supp. 1996). The Act sets a "Government-wide goal" that not less than five percent of the total value of all prime contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged small business concerns. Id. § 644(g)(1) (1994). The SBA is authorized to contract with other government agencies to provide goods and services. Id. § 637(a) (1994). The SBA then subcontracts that work to a minority-owned qualifying business, often (as here) without competition. Id.

A "qualifying business" is one that is small, as defined by statute, and 51% owned and controlled by individuals who are both "socially and economically disadvantaged." Id. § 637(a)(4)(A) & (B) (1994). Socially disadvantaged individuals are those who have "been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." Id. § 637(a)(5) (1994). An economically disadvantaged individual is a socially disadvantaged individual "whose ability to compete in the free enterprise system has been impaired due to diminished capital and

credit opportunities." Id. § 637(a)(6)(A) (1994).[6] The SBA selects program participants.

This statute and the implementing regulations include a presumption that small businesses owned and controlled by certain racial minorities are "socially disadvantaged" persons for purposes of the Section 8(a) Program and the Act.[7] Virtually all of the participants in the Section 8(a) Program are minority-owned. SRS argued to the lower court that the issuance of the HTS contract without competition on the alleged economic and racial disadvantage of the SBA's chosen contractor, HTS, was in violation of the U.S. Constitution. SRS had standing to raise these issues.

To have constitutional standing, a plaintiff must be able to prove all three of the following: (1) that it suffered an "injury in fact"; (2) that there is a causal connection between the injury and the conduct complained of; and (3) that it must be likely that the injury will be redressed by a favorable decision of the court. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). A plaintiff must also prove that he falls within the "zone of interests" to be protected or regulated by a statute or constitutional provision. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970). A court has no jurisdiction to consider the merits of a plaintiff's claims if the plaintiff does not have standing. See Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 255 (1994) (standing is jurisdictional).

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[6] Under the implementing regulations, individuals with a personal net worth exceeding $250,000 cannot initially qualify as economically disadvantaged. 13 C.F.R. § 124.106(a)(2)(*i*) (1997). An individual whose net worth exceeds $750,000 is not eligible for continued participation in the 8(a) Program. Id. § 124.111(a)(2) (1997).

[7] There is another preference program called the "SDB Program," for "small disadvantage businesses." In this Program, the would-be contractor self-certifies, rather than being selected by the SBA. SRS qualified as a small disadvantaged business until September 1993. The SBA then discontinued SRS's eligibility because the SBA concluded that SRS's owner was no longer "economically disadvantaged."

Both the district court and the Fourth Circuit held that the Petitioner SRS lacked standing to challenge the Government's award of the PMRF contract to HTS on the basis of race in violation of the Constitution's guarantee of equal protection, for the reasons stated above.

This holding is directly opposite to that of the U.S. Court of Appeals for the District of Columbia Circuit's holding one month later in Dynalantic Corp. v. Dep't of Defense, 115 F.3d 1012 (D.C. Cir. 1997). In Dynalantic Corp., Dynalantic sued DoD and the SBA to enjoin a Section 8(a) set-aside procurement of a flight simulator contract for which Dynalantic wished to compete. The district court in that case held that Dynalantic did not have standing because Dynalantic, like SRS, did not qualify for the Section 8(a) Program for reasons other than the race of its owners. On appeal, however, the D.C. Circuit wisely reversed.

Dynalantic, like the Petitioner SRS, could not claim to be "economically disadvantaged" under the Act. The D.C. Circuit stated that this

> argument is premised on a mischaracterization of Dynalantic's alleged injury. Appellant has no desire to participate in the 8(a) program. [Citation omitted]. Rather Dynalantic's injury is its lack of opportunity to compete for Defense Department contracts reserved to 8(a) firms.

Dynalantic Corp., 115 F.3d at 1016 (emphasis added). Unlike the Fourth Circuit, the D.C. Circuit acknowledged the real injury in fact -- the lack of an opportunity to compete for a federal contract.

The D.C. Circuit also rejected a similar argument that Dynalantic was not an "appropriate" plaintiff to bring a case concerning the constitutionality of the Section 8(a) Program; rather, according to the Civil Rights Division of the Justice Department, a "poor white contractor would be." Id. The D.C. Circuit held that "Dynalantic, as we have noted, does not seek to qualify for the 8(a) program, so whether it could meet the non-race-conscious requirements is wholly

irrelevant." Id.; contra SRS Technologies, Inc., app. at 3a-4a (Fourth Circuit held that SRS had no standing to challenge the race-conscious criteria of the Section 8(a) Program because it did not meet a non-race-conscious criterion of the Section 8(a) Program). Thus, a plaintiff's standing to challenge the award of a federal contract to a Section 8(a) company is **not** contingent upon the plaintiff's economic classification (or "race-neutral" or "non-race-conscious" criteria).

Dynalantic asserted, like Petitioner SRS in the present case, that it was ready and able to bid on the contract and future contracts but that a discriminatory policy prevented it from doing so on an equal basis. The D.C. Circuit agreed with Dynalantic and held that it was unnecessary for Dynalantic to "demonstrate that it actually would have won (or will win) the award of a particular contract." Id. (citing to Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995)).[8]

In summary, the District of Columbia Circuit stated:

> the interdependency of various provisions of the Act and the 8(a) regulatory scheme demonstrates that Dynalantic's injury -- its inability to compete on equal footing with 8(a) participants -- is traceable to the 8(a) program and is likely to be redressed by a decision holding all or part of the program unconstitutional. Dynalantic thus has standing to challenge the constitutionality of the 8(a) program, and the judgment of the district court is reversed.

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[8] The argument of whether SRS was "likely" to receive a contract was not addressed by the Fourth Circuit in its SRS Technologies decision with respect to the constitutional claims. The district court, however, addressed this argument and held that SRS's chance of obtaining a contract was remote, even though SRS was the incumbent. As the D.C. Circuit correctly held in Dynalantic Corp., the true test is whether the contractor is ready, willing and able to compete for the contract and then denied the opportunity to compete because of a discriminatory policy. It is this denial of the opportunity which causes the injury in fact. Whether or not the contractor would likely win the award is not relevant to the issue of injury in fact and hence, standing.

Dynalantic Corp., 115 F.3d at 1018 (emphasis added). The District of Columbia Circuit rightly concluded that Dynalantic had constitutional standing to pursue the action. In doing so, it found that Dynalantic met all three of the constitutional standing requirements -- an "injury in fact," a causal connection between the injury and conduct of which it complained, and that the injury would likely be redressed by a favorable decision of the court. Lujan, supra.

Although the relevant facts of the present case concerning Petitioner SRS and Dynalantic Corp. are the same, two opposite conclusions were reached. The Fourth Circuit denied the Petitioner SRS its day in court, while the District of Columbia Circuit correctly ruled on the issue of standing.

CONCLUSION

In both Dynalantic Corp. and the present case, the Plaintiffs asserted that they were denied an opportunity (and future opportunities)[9] to compete for a contract because of a racial preference program which violates the U.S. Constitution. Yet, in the present case the Fourth Circuit ruled the Plaintiff, Petitioner SRS, had no standing to raise such constitutional issues, whereas in Dynalantic Corp. the D.C. Circuit held the Plaintiff did have standing to raise such constitutional issues. The circuits are split as to this issue. As the litigation in this area grows, more divergent views from the circuits will inevitably arise unless the U.S. Supreme Court resolves the issue. Given the Government's presence in all Circuits, and flexible venue rules regarding where the Government may be sued, the Fourth Circuit should feel secure that litigants will avoid it when this issue arises and the D.C. Circuit should prepare for an onslaught of litigation.

To prevent this, however, and to avoid further confusion on the issue, this Court should grant certiorari to resolve the conflict concerning standing of a non-Section 8(a) company to challenge the constitutionality of an award of a federal contract without competition to a Section 8(a) company.

Respectfully submitted,

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[9] The D. C. Circuit also ruled that future use of the Section 8(a) Program would impact Dynalantic since it was likely the Government "will, sometime in the near future, attempt to procure under the 8(a) Program another contract which Dynalantic was ready, willing and able to bid." Dynalantic Corp., 115 F.3d at 1018.

APPENDIX A-UNPUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 96-1484

SRS TECHNOLOGIES, INCORPORATED,

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF DEFENSE, WILLIAM PERRY, SECRETARY, DEPARTMENT OF DEFENSE; SMALL BUSINESS ADMINISTRATION; THE DEFENSE EVALUATION SUPPORT AGENCY; HIGH TECHNOLOGY SOLUTIONS, INCORPORATED,

Defendants-Appellees,

and

THE MINORITY BUSINESS SUMMIT VOLUNTEER COMMITTEE,

Defendants.

April 10, 1997, Argued
May 6, 1997, Decided

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria (CA-95-1792-A)

DISPOSITION: Affirmed by unpublished per curiam opinion.

COUNSEL: Alan Mark Grayson, McLean, Virginia, for Appellant.

Appendix A

Gregory Bryan Friel, United States Department of Justice, Washington, D.C., for Appellees. On brief: James S. DelSordo, McLean, Virginia, for Appellant. Deval L. Patrick, Assistant Attorney General, Denis J. Dimsey, United States Department of Justice, Washington, D.C., for Federal Appellees; Nancy O. Dix, Mary A. Lehman, Gray, Cary, Ware & Freidenrich, San Diego, CA; Karla L. Palmer, Michael R. Charness, McDermott, Will & Emery, Washington, D.C., for Appellee High Technology Solutions.

BEFORE: Wilkinson, Chief Judge, and Hamilton and Motz, Circuit Judges.

OPINION

PER CURIAM:

SRS Technologies brought suit challenging the government's award of a technical support services contract to High Technology Solutions pursuant to the Small Business Administration's (SBA) 8(a) Program. SRS claims that the 8(a) Program is unconstitutional because it uses racial presumptions to determine "social disadvantage." SRS further alleges that SBA violated its own procurement regulations. The district court found that SRS lacked standing to raise these claims, and SRS appealed. We affirm the judgment.

I.

SRS Technologies provides technical support services to TRW, Inc. pursuant to a nationwide subcontracting agreement. TRW, in turn, services military facilities under an omnibus contract with the Defense Evaluation and Support Agency, a component of the Department of Defense. One of the sites where SRS formerly provided services to TRW is the Pacific Missile Range Facility (PMRF) in Kauai, Hawaii.

In 1995, the government announced that it would no longer use the TRW contract for work at the PMRF. As a result, SRS ceased performing services for TRW at the PMRF on December 31, 1995.

Appendix A

The government awarded the PMRF work to High Technology Solutions (HTS) through a program established under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a).

Under the 8(a) Program, the Small Business Administration (SBA) enters into contracts with other government agencies to provide goods or services. SBA then subcontracts the work to small businesses that are owned and controlled by "socially and economically disadvantaged" individuals. SBA's regulations establish a rebuttable presumption that members of a certain racial or ethnic groups are socially disadvantaged for the purposes of the 8(a) Program. 13 C.F.R. § 124.105((b)(1). HTS's owner is a Philippine descent, and SRS's owner is a native of India. Both derive from ethnic groups that are presumed disadvantaged.

Regardless of the presumption of social disadvantage, SBA requires each 8(a) Program participant to make an individualized showing of economic disadvantage. SBA's regulations provide that "an individual whose personal net worth exceeds $250,000 will not be considered economically disadvantaged for purposes of 8(a) program entry." 13 C.F.R. § 124.106(a)(2)(i). SRS cannot participate in the 8(a) Program because SRS's owner is a multi-millionaire.

On December 28, 1995, SRS filed a complaint alleging that the government awarded the PMRF contract to HTS on the basis of race in violation of the Constitution's guarantee of equal protection. SRS further alleged non-constitutional claims related to the award of the PMRF contract to HTS The district court dismissed the suit, finding that SRS lacked standing to raise any of its claims. SRS appeals.

II.

In order to show standing to raise its constitutional claim, SRS must demonstrate a "causal connection between the injury and the conduct complained of." *Lujan v. Defenders of Wildlife*, 504 U.S. 555,560 (1992). SRS challenges the racial presumptions of social disadvantage in SBA regulations implementing section 8(a) of the

Small Business Act. However, SRS was not prohibited from participating in the 8(a) Program for race-based reasons. Rather, SRS was ineligible to participate in the 8(a) Program because its owner is a multi-millionaire whose net work exceeded SBA's guidelines for economic disadvantage by several orders of magnitude. SBA's requirement of economic disadvantage for entry into the 8(a) Program is a race-neutral criterion. It was by virtue of this race-neutral criterion that plaintiff failed to qualify for a contract award, and is standing to challenge the race-conscious criteria is therefore lacking.

III.

SRS also raises non-constitutional claims regarding the government's award of the PMRF contract to HTS. First, SRS complains that HTS was not qualified to participate in the 8(a) Program because it had not fulfilled SBA's two-year experience requirement, as generally required by 13 C.F.R. § 124.107. However, even if HTS were not qualified, this would not affect SRS. Regardless of HTS's qualifications, SRS would still have been unable to participate in the 8(a) Program because of its owner is not economically disadvantaged.

Furthermore, even assuming that the government would open the PMRF contract to all bidders if HTS were disqualified, SRS would still lack standing. SRS's contract with TRW prohibits SRS from entering into other contracts which involve tasks that are directly related to work that SRS has performed under the TRW subcontract unless TRW grants a waiver. If the contract were open to competitive bidding, it is not certain that such a waiver would be forthcoming, as TRW might well desire to bid on the contract itself. Since SRS's ability to compete for the PMRF contract in this situation would depend on the "independent action of some third party not before the court," SRS cannot establish standing. *Lujan*, 504 U.S. at 560 (citation omitted).

SRS further alleges that the government violated 13 C.F.R. § 124.309 by failing to perform an adverse impact study before assigning the PMRF contract under the 8(a) Program. That regulation, however, is designed to protect small businesses who have contracts

with the government. SRS did not have a contractual relationship with the government at the time the PMRF work was contracted to HTS. Rather, SRS was performing a contract for TRW. As such, SRS was not a party protected by section 124.309 and has no standing to raise a claim under that regulation. *See GBA Associates v. General Services Administration*, 32. F.3d 898, 900 (4th Cir. 1994) (party must be within a statute's zone of interest to establish standing).

IV.

For the foregoing reasons we affirm the judgment of the district court.

AFFIRMED.

APPENDIX B-MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, FILED FEBRUARY 20, 1996

No. C/A 95-1792-A

SRS TECHNOLOGIES, INC.,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF DEFENSE, et. al.,

Defendants.

BEFORE: Claude M. Hilton, United States District Judge

MEMORANDUM OPINION

This matter came before the Court on plaintiff SRS Technologies, Inc.'s ("SRS") motion for summary judgment, and on intervenor-defendant High Technology Systems, Inc.'s ("HTS") motion to dismiss. The Court exercises federal question jurisdiction over this action. SRS, a California corporation, provides technical support services for various contracts to TRW, Inc., pursuant to a nationwide subcontracting agreement. TRW, in turn, services several military facilities under an omnibus contract with the Defense Evaluation Support Agency ("DESA"), a component of the Department of Defense ("DoD"). Under the omnibus contract, DESA may perform tasks itself, assign them to TRW, or contract with third parties directly.

One of the sites where SRS formerly provided services to TRW is the Pacific Missile Range Facility ("PMRF") in Kauai, Hawaii. The PMRF is used by the United States and several U.S. allies to develop missile weapons systems. The scope of work covered by SRS' subcontract included "technical and analytical support" to TRW,

including software development, computer operation, and data analysis. Plaintiff provided these services at the PMRF from September 1990 until October 1993, and again from November 1993 to December 31, 1995.

In 1994, DoD ordered the PMRF to reduce its operating expenses. PMRF determined that it could save approximately $200,000 in overhead costs through direct contracting instead of using the TRW omnibus contract. In the spring of 1995, PMRF announced that it would no longer utilize the TRW contract for support services. SRS was notified of the change, and was given an opportunity to propose a new direct arrangement with the PMRF. However, SRS could not guarantee continued performance, and its suggestions were unacceptable to PMRF officials.

In November 1995, DESA awarded a direct contract[1] to HTS for subtask work at the PMRF. SRS' subcontract was to expire on September 30, 1995, but was extended to December 31, 1995 to allow for transition of work to HTS. The HTS direct contract overlaps with the work plaintiff had been doing as a subcontractor. However, the HTS contract is broader in scope.

SRS brought this action to challenge the program under which HTS secured the contract. The direct contract was awarded pursuant to the Small Business Administration's ("SBA") 8(a) program, created under the Small Business Act, 15 U.S.C. § 637(a). The program is designed to benefit small businesses controlled by "socially and economically disadvantaged" individuals[2]. Social disadvantage, the first requirement for 8(a) eligibility, is presumed if an individual is a member of a certain racial groups. 13 C.F.R. § 124,195(b). HTS'

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[1] The contract is designated SEA 993-96-C-0002

[2] If the owner meets this description, the business is classified as a Small Disadvantaged Business ("SDB").

owner is of Philippine descent, and SRS' owner is a native of India. Both derive from ethnic groups that are presumed disadvantaged. An individual may also qualify by providing evidence of social disadvantage due to "gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause". 13 C.F.R. § 124.105(c)(1)(i). The second requirement, economic disadvantage, prevents individuals with a net worth of $250,000 or more from entering the program. Also, an 8(a) participant whose net worth reaches $750,000 must leave the program. 13 C.F.R. §§ 125.106(a)(2)(i), 124.111(a)(2)(ii).

Plaintiff alleges that the 8(a) program violates its right to equal protection of the laws under the Fifth and Fourteenth Amendments to the U.S. Constitution. SRS argues that since the 8(a) program awards federal contracts on the basis of race, it is constitutional only if it survives strict scrutiny review. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). SRS argues that the program is not narrowly tailored, since it does not purport to correct discrimination in the specific area of defense contracting. Therefore, 8(a) cannot survive strict scrutiny and should be struck down. SRS argues that but for this unconstitutional program, it would still be on the job in Kauai.

The plaintiff also alleges that DESA improperly applied 8(a) in awarding the contract to HTS. The program applies to new contract awards, and should not be used to deprive current contractors of work. Finally, plaintiff alleges that DESA's selection of HTS was arbitrary, and seeks to have the decision reviewed under the Administrative Procurement Act, 5 U.S.C. § 706(2)(A) ("APA").

In its motion to dismiss, HTS argues that plaintiff lacks standing to challenge the 8(a) program, since SRS was not denied the contract because of race. Rather, the plaintiff is disqualified from 8(a) participation because it is not economically disadvantaged. SRS qualified as an SDB until September 1993. At that point, plaintiff's SDB status was challenged by a competition. The Small Business Administration ("SBA") determined that the net asset worth of SRS'

owner exceeded $4 million, and therefore his company was not economically disadvantaged. The SBA's decision was upheld in SRS Technologies v. U.S., 894 F. Supp. 8 (D.D.C. 1995). The barrier to plaintiff's participation was purely economic. Therefore, HTS argues, SRS cannot challenge the constitutionality of the racial aspects of 8(a).

HTS also argues that SRS lacks standing because it has not alleged an injury in fact. SRS is under contract with TRW only. DESA was free to assign the work at PMRF to whomever it wished, or do it itself. Therefore, the only alleged injury is the disappointed hope that DESA would choose to assign the subtask to TRW, who would then pass it down to plaintiff. This, defendant concludes, is not an injury in fact sufficient to convey standing.

The Court finds that SRS lacks standing to challenge the constitutionality or administration of the 8(a) program. The constitutional challenge to the program is framed in terms of race. Race, however, had nothing to do with SRS' failure to win this contract. SRS' owner, Mohindar Sandhu, is presumed to be "socially disadvantaged" because he is a native of India. Far from being a barrier, Mr. Sandhu's ethnic background guaranteed SRS a chance to compete for 8(a) contracts. Plaintiff is an intended beneficiary, not a victim, of the racial classification it challenges. The obstacle is simply that Mr. Sandhu is too wealthy for SRS to count as an economically disadvantaged business. SRS' enviable problem is its substantial revenues. Plaintiff therefore lacks standing to challenge the constitutionality of the racial classifications in the 8(a) program.

Moreover, a plaintiff must show actual injury to have standing. Here, plaintiff has not shown any injury in fact, which would be the invasion of a legally protected interest. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992). SRS had not vested right to continue its work at the PMRF. There was never any contract between plaintiff and

DoD[3]. At most, SRS had an expectation that it would continue on as it had in the past. This type of injury is too speculative to convey standing. When a minority set-aside is challenged, a plaintiff has shown injury in fact when it "demonstrates that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so". Northeastern Florida Contractors v. Jacksonville, 113 S. Ct. 2297, 2303 (1993). Again, the 8(a) program's discrimination in favor of racial minorities did not prevent SRS from securing this contract. No injury in fact exists.

Finally, plaintiff has no standing to challenge the award under the APA. SRS was not a bidder for this contract, nor could it have been. As a result, SRS cannot challenge HTS' qualifications or the manner in which the contract was awarded. For the reasons stated above, the motion to dismiss should be granted. An appropriate Order shall issue.

s/Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
February 20, 1996

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[3] For this same reason, plaintiff's argument that 8(a) was improperly applied fails. HTS did not dislodge a current contractor. As already noted, plaintiff was not working under a contract with DoD and was not dislodged from any vested right.

APPENDIX C-ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED JULY 1, 1997

No. 96-1484 94-cv01477

SRS TECHNOLOGIES, INCORPORATED

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF DEFENSE, William Perry, Secretary,Department of Defense; SMALL BUSINESS ADMINISTRATION; THE DEFENSE EVALUATION SUPPORT AGENCY; HIGH TECHNOLOGY SOLUTIONS, INCORPORATED

Defendants-Appellees

and

THE MINORITY BUSINESS SUMMIT VOLUNTEER COMMITTEE

Defendant

BEFORE: Wilkinson, Chief Judge, and Hamilton and Motz, Circuit Judges

ORDER

Appellant has filed a petition for rehearing. The Court denies the petition for rehearing.

FOR THE COURT,

s/ Patricia S. Connor
Clerk

APPENDIX D-MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED JULY 9, 1997

No. 96-1484 CA-95-1792-A

SRS TECHNOLOGIES

v.

DOD

MANDATE

The judgment of this Court dated 5/6/97 takes effect today.

Patricia S. Connor
Clerk